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JUN 7 1967
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No. ~~1150~~ 65

In the Supreme Court of the United States

OCTOBER TERM, 1966

FRANK POAFPYBITTY, ET AL., PETITIONERS

v.

SKELLY OIL COMPANY

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OKLAHOMA

MEMORANDUM FOR THE UNITED STATES AS AMICUS CURIAE

THURGOOD MARSHALL,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

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MEMORANDUM FOR THE UNITED STATES AS AMICUS CURIAE

On May 8, 1967, the Court invited the views of the Solicitor General in this case, which is pending on petition for a writ of certiorari to the Supreme Court of Oklahoma.

Respondent obtained an oil and gas lease from petitioners, who are American Indians. Some time after producing wells were brought in, petitioners brought a damages action against respondent in a State court, alleging that respondent had failed to exercise reasonable diligence to prevent the waste of gas produced under the lease, in violation of the terms thereof, and had thereby impaired petitioners' royalties. The State Supreme Court sustained dismissal of the complaint on the ground that only the United

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States could sue to enforce petitioners' rights under the lease; that petitioners lacked capacity to sue. In our view, this ruling is unsound.

By the General Allotment Act, February 8, 1887, 24 Stat. 388, as amended, 25 U.S.C. 331 *et seq.*, the Secretary of the Interior was authorized to allot to individual Indians land on Indian reservations suitable for agricultural use, by issuing patents declaring "that the United States does and will hold the land thus allotted, for the period of twenty-five years, in trust for the sole use and benefit of the Indian to whom such allotment shall have been made" or his heirs. Section 5 of the Act, 25 U.S.C. 348. As that provision permits, the twenty-five year period has been repeatedly extended by order of the President, and the trust continues to this day. The lease at issue in the present case involves land which petitioners hold under trust patents.

The purpose of the trusteeship was and is to prevent improvident conveyances of the allotted lands, *Heckman* v. *United States,* 224 U.S. 413, 432–438, but not, of course, to prevent the Indians from developing the resources of the lands. An oil and gas lease provides a useful method whereby the Indian can reap the fruits of his allotted land, and he is accordingly expressly authorized to make such a lease, with the consent of, and under rules prescribed by, the Secretary of the Interior for the Indian's benefit and protection. 25 U.S.C. 396. Plainly, a suit by the Indian to enforce such a lease so as to enhance his benefits thereunder is consistent with the purposes of the Act—at least, where the Secretary consents to the

bringing of the suit. Petitioners' damages action against respondent was a suit of this character and the Secretary consented to its institution.

We emphasize that the Act's trust provisions are not premised on any view that Indians, like children or the insane, are wholly incapable of acting in their own affairs. The provision (mentioned above) which authorizes allottees to make leases belies any such view. More clearly still, the Act expressly authorizes suits by Indians against the United States to establish entitlements to allotments, 25 U.S.C. 345, and adverts to "actions brought in any State court or United States court by any patentee * * * for the possession or rents or profits of" lands under trust patent, 25 U.S.C. 347. Thus, the statutory scheme is to establish a limited federal guardianship, but not to disable the Indians from attempting to enforce and protect their interests in allotted lands by legal proceedings. Not surprisingly therefore, this Court, in the landmark case of *Heckman* v. *United States, supra,* expressly assumed the Indians' right to litigate with respect to allotted lands, 224 U.S. at 442, 445–446, and this assumption was unquestioned until the present litigation. See, *e.g., Choctaw and Chickasaw Nations* v. *Seitz,* 193 F. 2d 456 (C.A. 10).

The issue of the capacity of an Indian to sue under trust patents has not arisen frequently, doubtless due to the pervasiveness of the Secretary of the Interior's supervision. In the present case, the terms of the lease relating to waste, when read against the pertinent rules of the Secretary, clearly vest in his subordinates broad discretion and control over the lessee's opera-

tions (see Br. in Opp., App., pp. iii, vii-viii). If the lessee fails to operate in conformity with the directions of the federal supervisors and waste results, the Secretary will, of course, be quick to institute his own action to enforce the lease; his standing to do so is established by *Heckman* v. *United States, supra.* If the lessee does comply, as was believed by the responsible officials of the Department of the Interior to be the case here, the liklihood of a successful suit by the Indian lessor charging violation of the lease is plainly remote; accordingly, such suits are rarely brought. But should the Indian disagree with the federal supervisors and believe the lease was violated, the Secretary will normally, as here, consent to the Indian's bringing his own suit. And in such a case—for the reasons mentioned earlier—we think it clear that the suit cannot properly be dismissed for lack of capacity to institute a legal proceeding with respect to allotted lands.

Respectfully submitted.

THURGOOD MARSHALL,
Solicitor General.

JUNE 1967.

U.S. GOVERNMENT PRINTING OFFICE: 1967